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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-697.

MILES MAHONEY, DAVID GILMORE, THOMAS STATHIS AND JON STEINBERG,

Petitioners,

v.

THE PHILADELPHIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

I. JURISDICTION.

The Opinion and Order of the Commonwealth Court of Pennsylvania was filed on June 5, 1974, Petitioners' Appendix, pp. 20b-23b. The Order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was entered on September 5, 1974.

As appears from the Opinion of the Commonwealth Court of Pennsylvania, and as set forth in the Statement of Jurisdiction in the Petition for a Writ of Certiorari

(Petition at 2) the only title, right, privilege or immunity specially set up or claimed by Petitioners under the Constitution, treaties or statutes of the United States is the claim of a deprivation of property without procedural due process of law. This is thus the only federal question over which this Court can have jurisdiction upon a Writ of Certiorari, 28 U. S. C. § 1257(3).

II. COUNTER-STATEMENT OF QUESTION PRESENTED.

This case deals with the very narrow issue of the application of the procedural aspects of the due process clause of the fourteenth amendment of the United States Constitution to the specific factual situation of public employees who, as a matter of admitted stated law, have no possible claim of entitlement to job tenure. No other federal issue was raised below. The question presented is, therefore, as follows:

Do appointed, executive public employees who, under admitted state law, can have no possible legitimate claim of entitlement to tenure in their public employment, have a right to a predismissal hearing and correlative notice under the fourteenth amendment to the United States Constitution?

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Pennsylvania Statutory Provisions.

The Opinion of the Commonwealth Court of Pennsylvania presented a full and complete interpretation of the Pennsylvania Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. § 1541, *et seq.*, as applied to this case, and the Supreme Court of Pennsylvania denied allowance of a further appeal. The decision of the Pennsylvania Appellate Courts, thus rendered, interpreting the Pennsylvania Statutory Law is conclusive. *Groppi v. Wisconsin*, 400 U. S. 505, 507 (1971); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959). There is therefore no Pennsylvania statutory provision at issue in this case.

IV. COUNTER-STATEMENT OF THE CASE.

A. Factual Background.

Petitioners are four former non-tenured executive employees of Respondent The Philadelphia Housing Authority ("PHA"), each of whom held high level, policy implementing positions. As set forth in the Complaint in Assumpsit, which is included in the Appendix to the Petition for a Writ of Certiorari, Miles Mahoney was Deputy Executive Director of PHA (App. at 1b), David Gilmore was Acting Director of Social Service (App. at 2b), Thomas Stathis was Personnel Director (App. at 2b), and Jon Steinberg was Director of Management for Scattered Sites (App. at 2b).

All Petitioners entered the employ of PHA, by appointment, in late 1969 or early 1970, without any written understanding or agreement as to the terms of their employment. In October, 1970, PHA created the administrative policy commonly referred to as the "Personnel Policy". Section 8 of the policy referred to "dismissals, demotions, suspensions and appeals", and stated that dismissals would be made for cause, upon two weeks prior notice, giving reasons for the action, and that certain administrative personnel could appeal dismissals to a panel designated by PHA's Board of Directors.

In early 1972, the Board of Directors of PHA, and its Chairman, determined, as a matter of policy, that certain changes should be made in high level policy-implementing personnel (see App. at 11b). In February, 1972, Miles Mahoney was dismissed from PHA's employ. In March, 1972, the other three petitioners were notified in writing of their dismissal. A copy of the letter to Petitioner David Gilmore, informing him of the termination of his employment appears in the Appendix to the Petition at page 11b. The notices to Petitioners David Gilmore, Thomas Stathis

and John Steinberg contain a full and complete statement of the policy reasons for such action.

B. Proceedings Below.

On May 5, 1972, Petitioners commenced an action in equity in the Court of Common Pleas of Philadelphia County against PHA and its Members, requesting reinstatement. On May 30, 1972, the Court of Common Pleas sustained PHA's preliminary objections, in the nature of a demurrer, denied the requested relief and certified the matter to the law side of the Court. Petitioners filed no appeal from that decision.

On July 9, 1972, Petitioners brought an action in assumpsit in the Court of Common Pleas of Philadelphia County, claiming that the "Personnel Policy" created a form of contractual relationship which granted Petitioners some claim to tenure which would preclude summary dismissal. Petitioners further contended that, as a result of this purported claim to tenure, their dismissal without a pretermination hearing constituted a deprivation of property without procedural due process of law. By Order of May 7, 1973, the Court of Common Pleas again sustained PHA's preliminary objections, in the nature of a demurrer, and held that, under Pennsylvania law, Petitioners did not have any legitimate claim of entitlement to tenure which precluded summary dismissal, and, were therefore deprived of no "property" without due process of law.

Petitioners appealed this decision to the Commonwealth Court of Pennsylvania. By Opinion and Order filed June 5, 1974, the Commonwealth Court affirmed the Order of the Court of Common Pleas. In its Opinion, the Commonwealth Court held that, under established Pennsylvania law, as most fully set forth by the Supreme Court of Pennsylvania in *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166

A. 2d 278 (1960), appointed executive employees of public authorities could not, as a matter of law, be granted tenure which precluded summary dismissal, except by the legislature, as in the Pennsylvania Civil Service Act, Act of August 5, 1941, P. L. 752, 71 P. S. § 741.1, *et seq.*, or the Pennsylvania Teacher Tenure Act; Act of March 10, 1949, P. L. 30, Article XI, § 1121, *et seq.*, 24 P. S. § 11-1121, *et seq.* Any purported contract or agreement to the contrary was beyond the power of the public authority and void. Since, as Petitioners now admit (Petition at 7), there was no legislative grant of tenure which would apply to executive employees of PHA, Petitioners were subject to summary dismissal.

With respect to Petitioners' claim of a deprivation of property without due process of law, the Court found that, since under the well established law of Pennsylvania, Petitioners could not possibly have any legitimate claim to entitlement of job tenure, they did not have a "property" interest in job continuation under the decisions of this Court in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), and *Perry v. Sindermann*, 408 U. S. 593 (1972). The Commonwealth Court found that Petitioners were not deprived of "property" without due process of law.

Petitioners then filed, with the Supreme Court of Pennsylvania, a Petition for Allowance of Appeal from the Order of the Commonwealth Court. By Order entered September 5, 1974, the Petition for Allowance of Appeal was denied.

V. REASONS FOR DENYING A WRIT OF CERTIORARI.

A. The Decision Below Correctly Held, in Accordance With the Applicable Decisions of This Court, That Petitioners Were Not Deprived of Property Without Due Process of Law.

1. The Decisions of This Court Require That State Law Control the Determination of Whether the Interest of an Employee of a State Agency in Continued Employment and Job Tenure Is "Property" Under the Fourteenth Amendment.

In *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), and *Perry v. Sindermann*, 408 U. S. 593 (1972), this Court held that an employee of a state agency might have a property interest in continued employment, sufficient to be protected by the procedural aspects of the due process clause of the fourteenth amendment, only if the employee could establish a "legitimate claim to entitlement of job tenure". The decisions made clear that the legitimacy of such a claim, and therefore the existence of a "property" interest, do not arise from the Constitution, but rather from state law. As this Court stated in the Opinion in *Roth*, and restated in the Opinion in *Perry:*

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. 408 U. S. at 577 and 602 n. 7.

In his concurring Opinion to *Roth* and *Perry*, Mr. Chief Justice Burger specifically emphasized the controlling position of state law in the determination of the legitimacy of any claim to job tenure and a "property" interest in job continuation, and stated:

> Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. 408 U. S. at 604.

The Chief Justice further stressed the significance of state law to the holdings of *Roth* and *Perry* by stating that if relevant state contract law were unclear, a federal court should abstain from deciding the federal constitutional question of entitlement to a hearing. At least one lower federal court has chosen to follow the Chief Justice's Opinion and abstain in a case in which state law was not sufficiently clear to determine whether the plaintiff had a legitimate claim to job tenure. *Miller v. School District No. 167, Cook County, Illinois*, 354 F. Supp. 922 (N. D. Ill. 1973).

It is admittedly the law of Pennsylvania that Petitioners cannot have any legitimate claim to entitlement to job tenure. Notwithstanding this fact, and the clear holding of this Court that such state law is determinative, Petitioners argue that the decision of the Commonwealth Court of Pennsylvania applying these doctrines is somehow contrary to the decision of this Court in *Roth*, and "flouts" the decision in *Perry*.

Apparently, this argument is based upon Petitioners' assertion that the decision in *Perry* "held" that because the plaintiff in that case had a "property" interest in his job, he could not be denied renewal of employment without prior notice and hearing. This, however, is clearly not the holding of *Perry*. As this Court specifically stated:

> [T]he respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protections. 408 U. S. at 599. See also 408 U. S. at 602 n. 7.

In fact, the decision of this Court in *Perry* remanded the case for a determination of whether, under the appli-

cable contract law of the State of Texas, Mr. Sindermann did in fact have a legitimate claim to entitlement of job tenure and thus a "property" interest protected by the due process clause of the fourteenth amendment. Notwithstanding Petitioners' assertion to the contrary, the Opinion in *Perry* made clear beyond any possible question, that state law would ultimately determine the existence of a legitimate claim of entitlement to job tenure and a "property" interest in job continuation, by stating:

> If it is the law of Texas that a teacher in the Respondent's position has no contractual or other claim to job tenure, the Respondent's claim would be defeated. 408 U. S. at 602 n. 7.

2. Under Pennsylvania Law, Petitioners Can Have No Legitimate Claim of Entitlement to Job Tenure, and No "Property" Interest in Continued Employment Under the Fourteenth Amendment.

There can be no doubt as to the applicable Pennsylvania law regarding the legitimacy of Petitioners' claim of entitlement to job tenure. The Pennsylvania Courts have, in this case, held that Petitioners, as appointed executive employees of a public authority, with no statutory grant of tenure, can, as a matter of Pennsylvania state law, have no claim to job tenure which precludes summary dismissal.

This decision by the Pennsylvania courts, interpreting Pennsylvania law, is, of course, determinative, since "the construction of state laws is the exclusive responsibility of the state courts." *Speiser v. Randall*, 357 U. S. 513, 527 n. 7 (1958), and the decision of the Pennsylvania courts as to the Pennsylvania law involved in this case is conclusive. *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 86-87 (1947); *Huddleston v. Dwyer*, 322 U. S. 232, 237 (1944); *Scripto v. Carson*, 362 U. S. 207, 210 (1960).

As a result, it is clear beyond question that it is the law of Pennsylvania that public employees in Petitioners' position have no contractual or other claim to job tenure. In the words of this Court in its opinion in *Perry*, Petitioners' claim must be "defeated". 408 U. S. at 602 n. 7. The decision of the Courts below is therefore correct and fully consistent with the applicable decisions of this Court.

B. This Case Involved No Issues of Denial of Liberty Without Due Process of Law or Denial of "Substantive" Due Process of Law.

1. The Claims of Denial of Liberty Without Due Process of Law and Denial of "Substantive" Due Process of Law Were Not Raised Below and Are Not Properly Before This Court.

At the conclusion of their argument, Petitioners attempt to raise the claims that they have been deprived of liberty without due process of law, and denied "substantive" due process of law. Not only are these contentions without merit, but, as the Petition itself makes clear, they were not raised below and are presented for the first time in the Petition for a Writ of Certiorari. They are, therefore, not properly before this Court.

In their jurisdictional statement in the Petition for a Writ of Certiorari, Petitioners state that, in the Pennsylvania state courts, they asserted the deprivation of a purported property interest without procedural due process of law (Petition at 2). There is no reference to any claim of a deprivation of liberty without due process of law or a denial of "substantive" due process of law. The Opinions of the Pennsylvania state courts, reproduced in Petitioners' Appendix, concern only the claim of a deprivation of alleged property without due process of law.

Rule 23(1)(f) of this Court provides:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of the first instance and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised.

The only reference to a federal issue in Petitioners' statement of the case is the assertion that Petitioners raised the argument that they were denied a claimed property interest without procedural due process of law (Petition at 8). Petitioners' statement of the case contains no reference to a claim below of a deprivation of liberty without due process or a denial of "substantive" due process.

It is clear that these issues were not raised in the proceedings below, and Petitioners have so admitted in their Petition. Even if the Petition for Allowance of Appeal to the Pennsylvania Supreme Court had been granted, these issues could not have been raised, since they were not raised below. *Wenzel v. Morris Distributing Co.*, 439 Pa. 364, 266 A. 2d 662 (1970); *Brunswick Corporation v. Key Enterprises, Inc.*, 431 Pa. 15, 244 A. 2d 658 (1968).

It is well established that a federal issue may not be raised for the first time before this Court. *Moore v. Illinois*, 408 U. S. 786, 799 (1972); *Cardinale v. Louisiana*, 394 U. S. 437 (1969). Since Petitioners did not raise the claims of a deprivation of liberty without due process of law or a denial of "substantive" due process of law, these issues are not properly before this Court for decision.

2. This Case Presents No Substantial Federal Issue of Deprivation of Liberty Without Due Process of Law or Denial of "Substantive" Due Process of Law.

Even assuming, *arguendo*, that Petitioners' allegations of deprivation of liberty without due process or denial of

"substantive" due process were properly presented, they are without merit and present no basis for the granting of a Writ of Certiorari.

The first of these contentions appears to be based upon a claim that Petitioners have been denied liberty in the sense of the right to earn a livelihood, or work for a living. This, however, is not involved in this case. No Petitioner was denied the right to follow a chosen trade or profession. Each remained entirely free to obtain any employment they chose, except the positions with the Philadelphia Housing Authority, from which they were dismissed. See *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895-96 (1961).

In fact, this Court, in its decision in *Roth*, faced a substantially similar claim of deprivation of liberty without due process of law and found that since the nonrenewal of the teacher's contract in that case was not based on a charge of dishonesty or immorality, and there was no suggestion that the Respondent's interests in his "good name, reputation, honor, or integrity" were at stake, there was no deprivation of liberty. As this Court stated:

> It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. 408 U. S. at 575.

Further, this Court stated:

> Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty". 408 U. S. at 574 n. 13.

Clearly, this portion of the holding in *Roth* applies to this case. Petitioners' discharge did not involve any charge of dishonesty or immorality, nor any suggestion that Petitioners' good name, reputation, honor or integrity were at stake. A dismissal over competing policy considerations and similar matters (See App. at 11b) hardly rises to the "foreclosure of opportunities amounting to a deprivation of liberty."

Finally, Petitioners claim, without the citation of any authority, that this case involves a "fundamental issue of substantive due process." (Petition at 13). Apparently, this claim also includes Petitioners' extravagant hypothetical examples about possible restrictions upon the use of land, which, of course, have nothing whatever to do with the issues of this case.

Since Petitioners cite no authority in support of their claims relating to a denial of "substantive" due process, the basis of that claim is not entirely clear. It is, however, well established that "substantive" due process, to the extent that it is a viable current doctrine, requires only that a state law not be unreasonable, arbitrary or capricious, and that it be reasonably related to the object sought to be attained. *Nebbia v. New York,* 291 U. S. 502, 525 (1934); *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 391 (1937).

The Pennsylvania law involved in this case is not, as Petitioners suggest, that an interest in public employment cannot be a property interest subject to the procedural due process protections of the fourteenth amendment. It is rather, as expressed by the Supreme Court of Pennsylvania in *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A. 2d 278 (1970), that appointed executive public employees, particularly those in charge of implementing the policies of a public agency, may be granted tenure in their employment which precludes summary

dismissal only by the decision of the State legislature expressed in a comprehensive tenure scheme.

The basis for this doctrine and the interests served by it are clearly set forth by the Pennsylvania Supreme Court in the *Scott* Opinion, citing the earlier decision of *Mitchell v. Chester Housing Authority,* 389 Pa. 314, 132 A. 2d 873 (1957), as follows:

> "[G]ood administration requires that the personnel in charge of implementing the policies of an agency be responsible to and responsive to those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is a basic check on government possessed by the public at large." The power to dismiss summarily is the assurance of such responsibility. 402 Pa. at 154.

This doctrine, which clearly applies to these Petitioners, each of whom held high level, policy-implementing positions, whatever its wisdom, is certainly not arbitrary or capricious, and plainly bears a very real and substantial relation to the object which it seeks to serve.

This conclusion is further reinforced by the fact that the Pennsylvania law involved in this case, which Petitioners now claim is so arbitrary, capricious, and unreasonable as to be a denial of "substantive" due process has been consistently affirmed by this Court as applicable to the United States Government. As this Court stated in *Cafeteria Workers v. McElroy, supra,* a case cited several times by this Court in the *Roth* and *Perry* decisions:

> It has become a settled principle that government employment, in the absence of legislation, can be

revoked at the will of the appointing officer. 367 U. S. at 896.

VI. CONCLUSION.

For all of the foregoing reasons, Respondent The Philadelphia Housing Authority respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that, on this 19th day of December, 1974, three copies of this Brief in Opposition, were hand delivered to the office of Michael Brodie, Esquire, Pechner, Sacks, Dorfman, Rosen & Richardson, Suite 1300, 1845 Walnut Street, Philadelphia, Pennsylvania, Attorney for Petitioners.

I further certify that all parties required to be served have been served.

/s/ HAROLD CRAMER,

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